Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 80-118

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

KERRY P. DAY; RHETT G. CAMPBELL;
RICHARD D. HUFF; PETER H. LUKE;
PAUL M. SCOTT; JAMES A. TERHUNE;
and all others similarly situated,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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July 16, 1980

APPENDIX

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Note:

Petitioners have also filed an Appendix that contains copies of all of the regulations cited in their PETITION FOR WRIT OF CERTIORARI. This filing necessarily does not conform to the size requirements of the present Appendix. The Clerk has advised that copies of the Appendix containing the regulations will be kept in the Clerk's office and made available upon request.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

KERRY P. DAY, RHETT G. CAMPBELL, RICHARD D. HUFF, PETER H. LUKE, PAUL M. SCOTT, JAMES A. TERHUNE, Plaintiffs, on behalf of themselves and all others similarly situated, V. UNITED STATES OF AMERICA, Defendant.	X X X X X X X X X X X X X X X X	CIVIL ACTION NO. 4-76-21

MEMORANDUM AND ORDER

MAHON, District Judge.

Plaintiff brought this suit against the government to recover Basic Allowance for Quarters (hereinafter BAQ) pursuant to 37 U.S.C. § 403. There being no genuine issues of fact, both parties moved for summary judgment. Jurisdiction is present under 28 U.S.C. § 1346(a)(2).

Plaintiffs represent the class of all unmarried officers without dependents who, while serving in the Air Force, were permanently stationed in Thailand during some portion of the period from January 27, 1970 through January 26, 1976 and who were assigned to quarters of the United States or housing facilities under the jurisdiction of the Department of the Air Force. They assert that they are entitled to recover BAQ payments as provided by 37 U.S.C. § 403 for the period during which they were permanently assigned to Thailand. 37 U.S.C. § 403 in relevant part provides:

> (a) Except as otherwise provided by law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the monthly rates prescribed in accordance with § 1009 of this title, according to the pay grade in which he is assigned or distributed for basic pay purposes.
>
> (b) Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters. However, except as provided by regulations prescribed under subsection (j) of this section, a commissioned officer without dependents who is in a pay grade above pay grade 0-3 and who is assigned to quarters of

> the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade or rank and adequate for himself, may elect not to occupy those quarters and instead to receive the basic allowance for quarters prescribed for his pay grade by this section.
>
> * * *
>
> (j) The President may prescribe regulations for the administration of this section, including definitions of the words "field duty" and "sea duty."[1]

It is Plaintiffs' contention that the quarters they received in Thailand were not "appropriate to [their] grade, rank or rating and adequate for [themselves]." Therefore, the Plaintiffs argue, since they are not within the exclusion of 37 U.S.C. § 403(b), they were entitled to BAQ payments under 37 U.S.C. § 403(a). The aggregate payments are estimated to be in excess of twenty million dollars ($20,000,000.00).

I.

The Government's first argument in support of its motion for summary judgment is that Plaintiffs' quarters

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1. The statute did not remain constant throughout the period of this suit--January 27, 1970 to January 26, 1976. From January 27, 1970 to 1974, subsection (a) contained a table of BAQ payments. Also, prior to 1973, subsection (j) was designated subsection (g). None of these changes affect the merits of the summary judgment motions.

were adequate as a matter of law because of Executive Order No. 11157 § 403,[2] issued pursuant to 37 U.S.C. § 403(j). It is stipulated that all of the Plaintiff class lived in government facilities and that none paid any rent.

Plaintiffs contend that the Executive Order is not controlling in that it is inconsistent with the statute. The effect of the Executive Order No. 11157 is clearly to read the phrase "appropriate to his grade, rank, or rating and adequate for himself" out of the statute. Under the Executive Order, any quarters provided by the government are by definition adequate. This could hardly be what Congress intended when they enacted 37 U.S.C. § 403. The President was given the power in 37 U.S.C. § 403(j) (formerly (g)) to prescribe regulations for the administration of § 403. Such a delegation did not,

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2. Executive Order No. 11157 § 403 (1964):

> "Any quarters or housing facilities under the jurisdiction of any of the uniformed services in fact occupied without payments of rental charges . . . (b) at his permanent station by a member without dependents . . . shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such members under such circumstances."

however, give him the right to emasculate a portion of the Congressional mandate.

In United States v. Symonds, 120 U.S. 46, 7 S.Ct. 411, 30 L.Ed. 557 (1886) the Secretary of the Navy issued an order that certain ships were not to be considered in commission for sea duty. The effect of that order was to reduce Symond's pay to "shore service" level rather than "sea duty."

> But Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation, as established by law, by declaring that to be shore service which was, in fact, sea service, or to increase his compensation by declaring that to be sea service which was, in fact, shore service. The authority of the Secretary to enter orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court.

Id. at 49, 7 S.Ct. at 412.

The President's power to administer the BAQ statute is derived solely from that act and must, there-

fore, be consistent with the intent of Congress. Any Executive Order in conflict with the statute, as this one is, cannot be controlling. See Townsend v. Swank, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971); Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936); Real v. Simon, 510 F.2d 557 (5th Cir. 1973). Therefore, the Government's first argument in support of its motion for summary judgment must be rejected.

II.

In their cross-motion for summary judgment, Plaintiffs argue that the Air Force, on its own form 1430,[3] has itself defined Plaintiffs' quarters, as well as 98.1%[4] of the buildings used to house officers in Thailand, as inadequate. Plaintiffs rely on Lischak v.

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3. Forms 1430 are the Air Force real property records. Each building designated as officers' quarters was classified as to its condition on a Form 1430. The classes were as follows: (1) Usable—Class A (Adequate); (2) Usable—Class B (Substandard); (3) Forced Use (Substandard); (4) Sterile; and (5) Unusable.

4. The records on file show that 98.1% of the buildings designated for use as officers' quarters in Thailand during the applicable period were classified as substandard or worse on the Form 1430 real property records.

United States, 202 Ct.Cl. 598 (1974) for the proposition that an Air Force determination in the real estate records that a building is inadequate controls BAQ entitlements.

Plaintiffs' reliance is misplaced. During 1968, the time involved in the Lischak case, Air Force Manual 30-7 (hereinafter AFM 30-7), implementing 37 U.S.C. § 403, defined adequate quarters as those that are classified "Usable—Class A" and that meet the minimum standards of adequacy to be classified as Condition Code 1 on the real property records.[5] Clearly the real estate records were meant to define adequacy for the purposes of BAQ. Since the Air Force had classified Lischak's quarters "Usable--Class B," under the applicable regulation this meant those quarters had been defined by the Secretary as inadequate, and under the statute Lischak was thereby entitled to BAQ. Lischak, at 606-7.

Since the Lischak case, AFM 30-7 has been re-written. No longer is adequacy for BAQ purposes tied to

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5. Lischak v. U. S., 202 Ct.Cl. 598, 614 (1974), Finding 14.

the real estate records. This clearly distinguishes the Lischak case. Throughout the period involved in this suit AFM 30-7 (and later Air Force Regulation 30-7) defined adequacy for BAQ purposes in terms of square feet of living space. Plaintiffs, in their brief in support of their motion for summary judgment concede that AFM 30-7 and AFR 30-7 standards are applicable and controlling. (Plaintiffs' brief at 29.) While Form 1430 real estate records still exist, they are no longer tied into 37 U.S.C. § 403 by regulation. As shown by the affidavit of Major General William Gilbert, Form 1430 represents an assessment by the Air Force of a building's structural adequacy from an engineering standpoint. Unlike Lischak, at no time during the Plaintiffs' overseas service has there been any regulation in force that links Form 1430 and BAQ. The Court is, therefore, of the opinion that a determination of structural inadequacy in real property records is not an official decision that quarters are inadequate for BAQ purposes.

III.

In support of its alternative motion, the Government asks this Court to grant summary judgment

as to all the members of Plaintiff class who had at least 110 square feet of net living area (excluding bathing and toilet facilities).

After Congress delegated the authority to administer 37 U.S.C. § 403 to the President in § 403(j) (formerly § 403(g)), the President, in Executive Order No. 11157 § 407 (1964), in turn redelegated the authority to the Secretary of Defense and the Secretaries of the various services. Pursuant to this directive the Secretary of Defense promulgated Department of Defense Instruction No. 4165.47, a series of regulations which defined the minimum standards for adequacy in bachelor officers housing. These Department of Defense regulations provided that the minimum standards for adequacy of bachelor housing were to apply worldwide "unless specific exceptions are made by the Head of the DoD [Department of Defense] Component concerned." The Air Force issued Air Force Manual 30-7 (AFM 30-7) on January 1, 1970 to carry out the Department of Defense Instruction 4165.47. AFM 30-7 was superseded by Air Force Regulation 30-7 (AFR 30-7) on May 12, 1975. Both AFR 30-7 and AFM 30-7 required that

officers at a grade level of 0-1 or 0-2 were to receive 250 square feet of living space while 0-3 officers and above were to get 400 square feet consisting of a bedroom, living room, bath and kitchen. These are the same minimum standards set by the DoD Instruction 4165.47 of May 12, 1972.

In accordance with the proviso for specific exceptions contained in the DoD Instruction, the Secretary of the Air Force in paragraphs 2-2 of AFM 30-7 and AFR 30-7 stated that with respect to the minimum standards of adequacy set forth by those regulations: "Oversea major commands may make appropriate reductions in these standards for areas involved in combat or contingency operations or areas directly supporting these operations."

Pursuant to this delegation of authority, the Headquarters for the Pacific Air Forces (hereinafter PACAF) as a major overseas command issued a series of supplementary regulations to AFM 30-7 and AFR 30-7 between April 17, 1969 and September 16, 1975. These PACAF Supplements established a minimum adequacy standard in Thailand of 110 square feet per single officer

exclusive of bathing and toilet facilities.[6] On September 16, 1975 the last PACAF Supplement was issued which waived all minimum standards for housing officers permanently stationed in Thailand. This was, apparently, done as a result of the imminent discontinuance of American use of Royal Thai Air Force bases.

The chain of delegated authority went from Congress to the President to the Department of Defense to the Air Force and finally to the Headquarters for the Pacific Air Force. The PACAF thereupon determined that, in Thailand, bachelor officers' quarters comprising 110 square feet per person would be considered "appropriate to [the officer's] grade, rank, or rating and adequate for himself" within the meaning of 37 U.S.C.

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6. It may be noted that throughout the long history of BAQ payments "adequacy" has always been defined in terms of pure objective standards such as the number of rooms (See regulations of 1813 through 1922 quoted in Jones v. United States, 60 Ct.Cl. 552, 555-562 (1925), See also Hollister v. United States, 92 Ct.Cl. 137 (1940)), or square footage available per officer (See AFM 30-7 and AFR 30-7; Lischak v. United States, 202 Ct.Cl. 598 (1973)). In no military regulation or federal case was quarters deemed inadequate solely on the basis of some subjective standard such as condition of the quarters, construction type, furnishings provided, etc.

§ 403(b). Unlike Executive Order No. 11157, the Air Force regulations defining "adequacy" are not inconsistent with the Congressional mandate in 37 U.S.C. § 403. They are, therefore, entitled to great weight. Billings v. Truesdell, Kansas, 321 U.S. 542, 64 S.Ct. 737, 88 L.Ed. 917 (1944); United States v. Public Utilities Commission of Cal., 345 U.S. 295, 73 S.Ct. 706, 97 L.Ed. 1020 (1953).

Plaintiffs do not quarrel with the right of the Air Force to prescribe the definition of adequate housing found in AFM 30-7 and AFR 30-7 (400 square feet for 0-3 officers and above and 250 square feet for 0-1 and 0-2 officers). Their complaint is that paragraphs 2-2 of AFM 30-7 and AFR 30-7 are invalid to the extent that they purport to engraft geographical or military exceptions to the 400 and 250 square foot minimum requirements for adequacy of quarters. The question comes down to whether the provision in DoD Instruction 4165.47 for reduction of minimum standards for "areas involved in combat or contingency operations or areas directly supporting these operations" is valid. If it is, then the reduction by PACAF to 110 square feet per officer and

finally the waiver of all minimum adequacy standards after September 16, 1975 are also valid. The movement and housing of troops is strictly a military matter so long as the Constitution or federal law is not violated. The decision whether to construct permanent housing for military personnel is one that depends on the particular circumstances involved. It would be unrealistic to require worldwide uniformity in housing regardless of the circumstances or conditions. Decisions such as the size of officers' quarters in a combat or support area is the type of decision that should be left to the military, not the Federal Courts.

> The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. Orloff v. Willoughby, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953).

In Gilligan v. Morgan, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1972), the Supreme Court said:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible--as the Judicial Branch is not--to the electoral process. Moreover, it

> is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

Id. at 10, 93 S.Ct. at 2446.

The Headquarters for the Pacific Air Force under its authority delegated through channels from the President, has defined adequate quarters for 37 U.S.C. § 403. Geographical exceptions based on military necessities are neither unreasonable nor arbitrary. The Air Force has the right to reduce standards of housing for personnel in troubled areas. The 110 square feet minimum standard in Thailand promulgated by the PACAF is a valid regulation and controlling this case. Under Plaintiff's interpretation the military's hands would be tied. Either massive housing projects would have to precede any American military presence or millions of dollars in BAQ payments would be the price of quick action. This Court is unwilling to impose such a burden on the military. Accordingly, the Government's motion for summary judgment must be granted as to all members of Plaintiff class who received 110 square feet

or more per officer while in Thailand between January 27, 1970 and September 16, 1975.

The Court is also of the opinion that military necessity may sometimes dictate the suspension of all minimum standards of adequacy as was done in Thailand on September 16, 1975. All claims for BAQ payments based on service in Thailand after that date must, therefore, also be dismissed.

IV.

As the Government points out, it is unclear whether any of the Plaintiff class every [sic] received less than 110 square feet. It is possible that granting the Government's partial summary judgment will obviate any consideration of Plaintiffs' cross-motion for summary judgment. The Court feels that it must, therefore, refrain from ruling on the Plaintiffs' motion until it is convinced that some members of the Plaintiff class remain in the case. A hearing must be held at a later date during which any member of the class may attempt to show that he is not within the subclass of dismissed Plaintiffs.

It is, therefore, ORDERED that the Government's Motion for Summary Judgment as to the subclass of Plaintiffs who received 110 square feet or more be, and hereby is, granted.

It is further ORDERED that summary judgment be, and hereby is, granted against all claims based on service in Thailand after September 16, 1975.

It is further ORDERED that Plaintiffs' cross-motion for summary judgment be neither granted nor denied pending a later hearing on the remaining members of the Plaintiff class.

Judgment will be entered accordingly.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1092

KERRY P. DAY; RHETT G. CAMPBELL;
RICHARD D. HUFF; PETER H. LUKE;
PAUL M. SCOTT; JAMES A. TERHUNE;
and all others similarly situated,
Appellants,

V.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before GEWIN, RUBIN and SAM D. JOHNSON, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

"Join the Navy, and see the world" was once the seductive slogan to enlistment. Service in the other branches of the armed forces may also entail assignment to distant and exotic posts. Whether on duty in the United States or at far-off bases, a commissioned officer is entitled by act of Congress to quarters "appropriate to his grade, rank, or rating and adequate for himself." 37

U.S.C. § 403(b). If these are not provided, he is entitled to be paid a monetary sum, a basic allowance for quarters (BAQ).[1]

This is a class action on behalf of all unmarried Air Force officers without dependents who were perma-

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1. 37 U.S.C. § 403 provides in part:

> (a) Except as otherwise provided by law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the monthly rates prescribed in accordance with section 1009 of this title, according to the pay grade in which he is assigned or distributed for basic pay purposes.
>
> (b) Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters.
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> * * *
>
> (j) The President may prescribe regulations for the administration of this section, including definitions of the words "field duty" and "sea duty".

The statute did not remain constant throughout the period of this suit. Until 1974, subsection (a) contained a table of BAQ payments. Also, prior to 1973, subsection (j) was designated subsection (g). None of these changes affect the issues here.

nently stationed in Thailand and provided quarters there during the six year period from January 27, 1970 through January 26, 1976. None was on field or sea duty; and therefore, none was deprived of BAQ by the statutory exemption for military personnel so assigned, 37 U.S.C. § 403(c). Each was provided with quarters that he occupied, but the class action claims that what was supplied was not adequate and appropriate and, therefore, claims BAQ payments as provided by 37 U.S.C. § 403 for the duration of each member's permanent assignment in Thailand.[2]

Both parties were trained for lightning battles. The government sought to bomb the plaintiffs out of court by motion for summary judgment dismissing their case. It contended that each plaintiff was in fact provided some quarters and that anything actually supplied was legally sufficient under an executive order and a military regulation; alternatively, it relied on

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2. The principles involved in this suit are of obvious importance. In addition, the district court noted that the total claim amounted to approximately $20,000,000. Since no individual claim exceeds $10,000, jurisdiction was properly based on 28 U.S.C. § 1346(a)(2).

another regulation that defines all quarters containing 110 square feet of net living area (excluding bathing and toilet facilities) as adequate in Thailand. Equally determined to win quick victory, the plaintiff class countered with a motion for summary judgment on the grounds that all quarters provided were patently inadequate because 98.1% of the buildings used to house officers in Thailand were classified in some category other than "Usable--Class A (Adequate)" in the real property records maintained by the Air Force, Form 1430, and because none of the quarters met the minimum adequacy standards for bachelor quarters generally applicable when quarters are assigned in the United States.

Until September 16, 1975, each class member was provided with quarters embracing at least 110 square feet. The district court held that these were adequate as a matter of law without regard to their actual condition. On September 16, a military regulation suspended all minimum standards of adequacy. Holding that this was dictated as well as justified by military necessity, the district court also dismissed the claims subsequent to that date.

The case comes to us without any factual determinations concerning the adequacy of what was provided. We review only the summary judgment, which

held, as a matter of law, that the Air Force's regulatory prescriptions were within the authority delegated by the statute.

Before discussing the two sets of rules that cover the two separate time periods, we consider the government's first-strike argument: "It is stipulated that the plaintiffs were each assigned some kind of quarters and paid no rent." The statutory section providing for BAQ gives the President power to prescribe regulations for its administration. 37 U.S.C. § 403(j). Pursuant to that grant of authority, the President issued Executive Order No. 11,157, a section of which says simply that any quarters occupied rent free at an officer's permanent station "shall be deemed . . . appropriate and adequate."[3]

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3. Any quarters or housing facilities under the jurisdiction of any of the uniformed services in fact occupied without payments of rental charges . . . (b) at his permanent station by a member without dependents . . . shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such members under such circumstances. . . .

Exec. Order No. 11,157 § 403, 29 Fed. Reg. 7973 (1964), reprinted as amended in 37 U.S.C. § 301 note, at 647-652 (1977).

Therefore, the government argues, the quarters were ipso facto adequate.

The district court properly grounded this sophistry. The general rule enacted by Congress is that all officers are entitled to BAQ; there is no exception to the legislative mandate when adequate and appropriate quarters are provided. The power to make regulations defining what is adequate and appropriate is not a delegation of authority to wipe out the statute by imposing an Orwellian definition that adopts no standard at all. Regulations must be consistent with the statutory authority that alone gives them validity. Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 746, 93 S.Ct. 1773, 1785, 36 L.Ed.2d 620, 634 (1973) (quoting Volksvagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090, 1097 (1968)); Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936); United States v. Symonds, 120

U.S. 46, 7 S.Ct. 411, 30 L.Ed. 557 (1887); Real v. Simon, 510 F.2d 557, 564 (5th Cir. 1975). They may lack rhyme, and, unfortunately, sometimes are turgid, but they must be based on some kind of reason.

The government's argument in support of the non-standard effective on September 16, 1975 is almost as untenable. Pursuant to a series of delegations of power, from the President to the Secretary of the Department of Defense, to the Secretary of the Air Force, to oversea major commands, the Headquarters for Pacific Air Forces (PACAF) waived all minimum standards for housing officers permanently stationed in Thailand on September 16, 1975. This was, the district court found, "apparently done as a result of the imminent discontinuance of American use of Royal Thai Air Force bases." (Emphasis supplied.) It considered this change a matter of military necessity, hence valid.

Even assuming the validity of the factual premises, we must reach a different conclusion. The Congressional command is to pay BAQ to all those not on field duty unless they are provided with quarters adequate and appropriate. Military necessity justifies assignment of

personnel to field duty, but the statute contains no military-necessity exception from the BAQ requirement for those assigned to a permanent station wherever that station may be or under whatever conditions the assignment may occur. The statute did not authorize the Chief Executive to suspend the payment of BAQ if political or military exigencies made it difficult or inexpedient to provide what was adequate and appropriate; not did it authorize him to accomplish the same result by sprinkling a few regulatory words.

There is, therefore, no real difference between the dogmatic Executive Order 11,157 that "everything provided is adequate" and the PACAF order that "after September 16, everything in Thailand is adequate," save that the later order deals with a specific geographic area and a shorter time period. The result decreed in 1975 was as imperious as the universal command that anything the military provides suffices; neither defines what is adequate or appropriate in any fashion or attempts in any way to meet the implicit statutory standard. See United States v. Cartwright, 411 U.S. 546, 93 S.Ct. 1713, 36 L.Ed.2d 528 (1973); cf. Townsend v. Swank, 404

U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971); Bell v. United States, 366 U.S. 393, 81 S.Ct. 1230, 6 L.Ed.2d 365 (1961).

Let us turn now to the period before September 16, 1975. In Executive Order No. 11,157 § 407 the President redelegated his authority under 37 U.S.C. § 403(j) to the Secretary of Defense and the Secretaries of the various services. Pursuant to this directive the Secretary of Defense promulgated Department of Defense Instruction No. 4165.47 (April 6, 1967; revised May 12, 1972; revised Oct. 23, 1974) defining the minimum standards of adequacy for bachelor officers' housing. This Instruction establishes standards applicable worldwide "unless specific exceptions are made by the Head of the DoD [Department of Defense] Component concerned." Id. ¶ IV(B) (May 12, 1972).[4]

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4. Prior to 1972 DoD Instruction 4165.47 did not contain the exception quoted but rather provided that its standards were applicable only at "such permanent overseas installations as may be designated by the Secretaries of the Military Departments." The officers make no claim that it applied to Thailand. The only relevant regulation applicable to Thailand before 1972 was therefore AFM 30-7, described below. Since AFM 30-7 is also applicable and controlling after 1972, the change in DoD Instruction 4165.47 is irrelevant to this appeal. See Lischak v. United States, 202 Ct.Cl. 598, 613 (1973).

The Secretary of the Air Force subsequently issued regulations requiring that officers at the pay level of 0-1 or 0-2 (1st and 2nd Lieutenants, respectively) were to receive 250 squre feet consisting of a combined bedroom and living room and private bath. Officers at pay level 0-3 and higher (Captain and above) were to receive 400 square feet consisting of a private bedroom, a private bath, a shared living room and a shared kitchen. Air Force Manual (AFM) 30-7, Change 1 ¶ 2-4 (April 26, 1974); Air Force Regulation (AFR) 30-7, Table 2-1 (May 12, 1975).[5] These same minimum standards were set by the DoD Instruction 4165.47 of May 12, 1972. They contain no reference to the physical condition of the quarters or the services provided, defining adequacy solely in terms of number of rooms and square footage.

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5. Prior to 1974, AFM 30-7 defined adequacy in the same terms but absent the specification of a given number of square feet. In 1975 AFM 30-7 was superseded by AFR 30-7 containing the same terms as the version of AFM 30-7 issued on April 26, 1974. Neither of these changes is material to the issue at hand.

Historically, this has been the sole type of standard used by the armed forces. There was a statutory requirement that quarters be furnished at public expense at least as early as 1813; the officers' entitlements were to a certain number of rooms, nothing being said about their condition. Jones v. United States, 60 Ct.Cl. 552, 555 (1925). Ever since then, officers' entitlements have almost always been defined in terms either of number of rooms or square feet of space. See United States v. Phisterer, 94 U.S. 219, 24 L.Ed. 116 (1876) (Act of 1863); Hollister v. United States, 92 Ct.Cl. 137 (1940) (Act of 1922). The unsuitable condition of the rooms furnished generally has not been deemed a sufficient basis for a claim to payment of an allowance for quarters. See id. A regulation taking into account the type of structure, the condition of the premises, or the utilities and conveniences supplied in determining adequacy, such as the regulation considered in Lischak v. United States, 202 Ct.Cl. 598 (1973), is an historical anomaly.

In accordance with a proviso for specific exceptions contained in the DoD Instruction, the Secretary of the Air Force stated that, with respect to

the minimum standards of adequacy set forth by those regulations: "Oversea major commands may make appropriate reductions in these standards for areas involved in combat or contingency operations or areas directly supporting these operations." AFM 30-7 ¶ 2-2 (Jan. 1, 1970); AFR 30-7 ¶ 2-2 (May 12, 1975). Thailand was such an area throughout the period relevant to this appeal.

Pursuant to this delegation of authority, PACAF as an overseas major command issued a series of supplementary regulations. These PACAF Supplements established as the minimum standard of adequacy 110 square feet, exclusive of bathing and toilet facilities. Thus, while the PACAF definition reduces the space allowance it prescribes no standards for the physical facilities in which they are located. If there is now such a regulatory embellishment, it comes only because the Air Force prior to 1970 began the practice of maintaining real property records on each building designated for use as officers' quarters. These are maintained on a form, AF Form 1430. The form provides for the designation of each building's condition as "Usable--Class A

(Adequate)", or "Usable--Class B (Substandard)," and "Forced Use (Substandard)," "Sterile" or "Unusable."[6]

The officers here claim, and we accept for purposes of this appeal, that the real property records thus compiled classify 98.1% of the buildings used as officers' quarters in Thailand as less than "adequate."[7] The completion of AF Form 1430 is required by an Air Force regulation, AFM 93-1, which requires the Air Force to maintain real property accountability records on all structures within each Air Force installation. These records contain information concerning the physical attributes of the structures including such items

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6. See footnote 6 at end of opinion.

7. According to the plaintiffs, 330 buildings (45.3%) were classified as "Usable--Class B (Substandard)," 379 buildings (52.1%) were classified as "Forced Use (Substandard)" and 5 buildings (.7%) were classified as "Unusable." Only 14 buildings (1.9%) were classified as "Usable--Class A (Adequate)."

as gross dimensions and construction materials as well as various types of accounting data.[8]

During the period to which this action relates nothing in any regulation specified that the condition code used on Form 1430 determines the adequacy or inadequacy of the buildings described for purposes of BAQ. The words used are the same: both the statute and the real property records refer to adequacy. But their purposes are different; only semantic identity would lead to the conclusion that what is considered adequate physically in describing a building is also to

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8. AFM 93-1, the regulation providing authorization and instructions for the preparation of Form 1430, defines the purpose of the form. It states in part:

> 3-2. Accounting Record Forms. AF Forms 1430 . . . constitute the formal real property accountable records. They have been designed to record all pertinent engineering and statistical data concerning Air Force real property. This information, with supporting maps, plans, specifications and real estate instruments provides the needed engineering data for day-to-day maintenance and operation requirements of the base civil engineer as well as for master planning and project and military construction program development. The recorded data is also the basis for the real estate facilities cost system and attendant budget for maintenance, repair, and operation of the facilities, and for reports required by all echelons of command such as the USAF Real Property Inventory Detail List required by AFM 87-18.

determine whether quarters in the building are adequate and appropriate for purposes of the statute.

Prior to the time period relevant to this suit, AFM 30-7 contained a specific definition of "adequate" and "inadequate" quarters for BAQ purposes. The August 1, 1967 edition of the regulations required officers quarters to be "classified" as "Usable—Class A" . . . and [to] . . . meet the minimum standards of adequacy for occupancy established in this manual." It also stated, "These quarters will be carried as Condition Code 1 (Usable--Class A) on the real property records." For claims arising when that regulation was in effect, the Court of Claims held in Lischak v. United States, 202 Ct. Cl. 598 (1973), that the condition code on AF Form 1430 defined adequacy for BAQ purposes. The government does not criticize this result.

However, the Air Force subsequently cancelled the regulation that tied "adequacy" for BAQ purposes to the real property records and replaced it; the new regulation no longer refers in any way to AF Form 1430 or the condition code placed on it. See AFM 30-7 (Jan. 1, 1970); AFR 30-7 (May 12, 1975).

The inferential relationships by which the officers seek to establish a continuing tie between BAQ and AF Form 1430 are too gossamer to link them. Appendix A2 to AFM 30-7 and AFR 30-7 merely provides instruction for completing AF Form 515--"Bachelor Housing and Guest House Utilization/Occupancy Report"--a form showing the utilization of available bachelor housing. Under those instructions each installation is to identify the number of housing spaces classified as condition code "1", "2" or "3". This appendix provides no reasonable basis to infer that the Secretary of the Air Force intended to make the condition codes of AF Form 1430 definitional for BAQ purposes.

Indeed, AF Form 515 itself makes it clear that the condition code is not intended to show the adequacy of quarters for purposes of claiming entitlement to BAQ. As the instructions for completing that form show, all quarters whose condition code is a "1" or "2" are to be grouped together under the heading of "usable" spaces. This lack of distinction between condition code "2" (substandard) housing and condition code "1" (adequate) housing make it apparent that, whatever significance the

condition code may have in terms of engineering considerations or construction planning, it was not intended to serve as the criterion for distinguishing between adequate and inadequate housing for BAQ purposes.

But, the officers claim, even if the real estate records do not define adequacy, the space standards for the continental United States do, and these must be applied uniformly world-wide; the statute, they argue, does not permit geographic distinctions to be drawn in the regulations.

It is true that the grade, rank, or rating of each officer did not change when he was assigned to Thailand. However, the assignment patently changed his place of duty. It is not unreasonable to make a distinction between what is adequate (even in terms of space alone) for quarters in the tropics and what is suitable at the South Pole. It is no more unreasonable to take into account in considering adequacy not only the facts of climate but also the military, economic and social environment in the area where the officer is serving. The PACAF definition of 110 square feet (instead of 250 or 400 square feet) is not attacked because it is

unreasonable, but merely because it is different. The discretion of the military to set different adequacy standards for housing for different areas and conditions was upheld in Lischak v. United States, 202 Ct.Cl. 598 (1973), the Court of Claims decision upon which the officers rely to establish the authority of AF Form 1430. Id. at 607.

Such geographic distinctions are not precluded by the doctrine of statutory construction, expressio unius est exclusio alterius--the expression of one excludes the other. Congress authorized the standards of adequacy to vary according to grade, rank, rating and number of dependents, but this did not imply an exclusion of all other criteria for determining what is adequate for a particular rank of officer.

Because the officers raise no other attack on the square foot standard, the issue of its validity was properly determined on motion for summary judgment. There were no material issues of fact to be resolved. The regulation drew a distinction within the power of the President or his delegates to make. Its validity need not depend upon the President's power as Commander-in-

Chief or traditional judicial deference to military management of military affairs, see Gilligan v. Morgan, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973); Orloff v. Willoughby, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953). See also Warren, The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181 (1962).

However, for reasons set forth above, even the utmost deference to military judgment in armed forces affairs does not permit an air force commandant, or even the Chief Executive, to proclaim the arbitrary decision that anything the Air Force provides is by definition adequate.

For these reasons, we reverse as much of the judgment as dismisses the claims of the officers for BAQ after September 16, 1975. We affirm as much of the judgment as dismisses the claims of the officers who received 110 square feet of living space, exclusive of shared bathing and toilet facilities. To our mandate we add one caveat: the record does not permit us to determine and we express no opinion concerning whether any or all of the officers were in fact furnished adequate and appropriate quarters. That issue, like others,

remains to be resolved in further proceedings consistent with this opinion.

REVERSED IN PART AND REMANDED.

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6. Each AF Form 1430 contains a "1", "2", "3", "4", or "5" within the "condition" line and block space. The following definitions of "condition" apply to each "1", "2", "3", "4", or "5" found within a particular condition line and block space:

> 1 = Usable—Class A (Adequate)—Generally meets criteria. A facility which can be used to house the function for which currently designated through end position use with reasonable maintenance and without major alteration or reconstruction. Its functional adequacy, physical condition, structural adequacy, location, and adequate utility systems, i.e., heating, air conditioning, ventilation, power, etc., are the major elements of the determination. The use of this code does not prohibit project work. However, any construction project will indicate either a change in use, conversion or addition.
>
> 2 = Usable—Class B (Substandard)—Upgrading required and practical. A facility which is structurally sound, and which is inherently capable of being raised to Usable—Class A standards for housing function for which currently designated by reasonable and practical expenditure of funds; i.e., alteration, soundproofing, relocation, strengthening, fire protection deficiency correction, air conditioning, heating, or mechanical ventilation.
>
> 3 = Force [sic] Use (Substandard). A facility that cannot practically be raised to

meet Usable—Class A standards for housing function for which currently designated, but which, because of necessity must be continued in use for a short duration, or until a suitable facility can be obtained. Its physical condition, location, lack of adequate utility systems or other overriding factors are such that the facility cannot be justifiably or economically improved and/or upgraded for that function. This definition is also applicable to a leased facility where the lease was entered into as the only means by which the required space could be provided. This excludes leases which are advantageous to the Air Force for reasons of short duration of requirement, location, economics, etc., which will be Code 1.

4 = Sterile—A facility which: (a) does not meet the condition classification Codes 1, 2, 3, or 5; (b) is excess to mission requirement in designed, changed, or converted use and is not, due to economic considerations, considered appropriate for disposal. The expenditure of maintenance funds on facilities in this classification is not authorized except for safety, health, and/or 'pickling' the facility. This code will apply to all facilities as they are vacated when the entire installation becomes excess of requirements.

5 = Unusable—A facility which is no longer tenable for any purpose. It assumes that unsatisfactory or unsafe conditions exist which render it unacceptable and useless for housing personnel, equipment or supplies. This designation cannot be applied until the facility is vacated and when applied, requires disposal action within 120 days. Classi-

fication of airfield pavements as unusable must be approved by Hq USAF.

NOTES:

1. The Real Property Condition Codes 1, 2, and 3 are applied based upon the capability of the real property facility to accommodate the function for which currently designated on the 1-HAF-Z17. Therefore, that code is no indication of the ability of the facility to accommodate a different function.

2. Although structural condition must be considered in ascertaining code to be assigned, it is not the sole factor. Location of the facility with reference to other facilities or to adverse environmental conditions (air, noises), functional layout, and condition of support utilities are equally important.

3. Facilities which would be Code 1 will not be assigned a Code 2 or 3 based only on inadequate size.

4. The Data Element, 'Forced Use,' was formerly the Element, 'In Use.'

AFM 300-4, Vol. IV (June 15, 1973).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1092

KERRY P. DAY, RHETT G. CAMPBELL,
RICHARD D. HUFF, PETER H. LUKE,
PAUL M. SCOTT, JAMES A. TERHUNE,
on behalf of themselves and all
others similarly situated,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

- - - - -

Appeal from the United States District Court for the
Northern District of Texas

- - - - -

ON PETITION FOR REHEARING

(April 17, 1980)

Before GEWIN, RUBIN and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

- s -
United States Circuit Judge

Form 703-2